No. 15211

United States Court of Appeals
For the Ninth Circuit

COWLITZ TRIBE OF INDIANS, *Appellant,*

vs.

THE CITY OF TACOMA, a Municipal Corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
THE HONORABLE GEORGE D. BOLDT, *Judge*

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

APPELLANT'S STATEMENT OF THE CASE

This is an action by the COWLITZ TRIBE OF INDIANS for damages and for an injunction against the City of Tacoma. The COWLITZ TRIBE OF INDIANS is a tribe recognized by the United States since 1855 when Territorial Governor Isaac Stevens made an unsuccessful attempt to make a treaty of peace and cession of their aboriginal title to their tribal lands in the Cowlitz River watershed in Southwestern Washington. Congress provided for extinguishment of Indian Title to their aboriginal lands (R. 90, 91) by treaty between the United States and the Cowlitz Tribe, but since no treaty was ever consummated their aboriginal title to their tribal lands has never been extinguished, as provided by acts of Congress hereinafter set forth. The tribal lands extend over three counties in Southwestern Washington, Thurston, Lewis and Cowlitz Counties.

The City of Tacoma has embarked on a plan to build two dams on the Cowlitz River in complete disregard of the rights of the Cowlitz Indians to their aboriginal lands under a license issued by the Federal Power Commission (R. 16) Project 2016. The City of Tacoma is acting in its proprietary capacity as a merchandiser of power to the general public and expects by its own admission to make a profit in excess of one million dollars per year. The City of Tacoma admittedly (R. 16) is proceeding to build those dams in disregard of plaintiff's rights. The defendant is proceeding to build the dams which will deprive the plaintiffs of their tribal lands, their water in the Cowlitz River and their fishery consisting of salmon and smelt which abound in this river and have furnished a large portion of the diet and livelihood of plaintiffs since time immemorial.

The aboriginal title of nine tribes adjacent to and north of the Cowlitz Tribal lands was extinguished by the Treaty of Medicine Creek in 1855, consisting of 2,236,160 acres (R. 92).

The defendant's answer admits that the graves of the plaintiffs' ancestors (R. 6, 7) in their ancient burial grounds numbering from four to six will be inundated and that defendant has made no provision whatsoever to disinter, remove, or rebury the departed ancestors (R. 14, 15) of the Cowlitz Tribe of Indians. The Cowlitz Tribe has never transferred or relinquished these lands in any manner whatsoever and they claim hunting, fishing and water rights in the Cowlitz watershed and river and its tributaries and all rights appurtenant thereto.

That the present members of the Cowlitz Tribe are the descendants of the tribe by the same name who sat in Treaty Council with Isaac Stevens in 1855 wherein they were recognized as a tribe and dealt with as a sovereign Indian nation and exist today as a duly organized tribe of American Indians by the Secretary of Interior.

That they are extremely primitive, living in the most dire poverty, and most of the Taitnapan Band speak little or no English and live in the same locations that their ancestors occupied in 1830 to 1855.

Ruling of District Court

The district court granted defendant's motion to dismiss on the grounds that the court was without jurisdiction over the subject matter. Plaintiffs filed notice of appeal on May 11, 1956, and received the Record on Appeal on October 30, 1956.

II.

JURISDICTION

This cause arises under the Constitution and laws of the United States and is otherwise within the Jurisdiction of the Federal Courts because of the time honored position of the American Indians as wards of the United States.

Violation of the 14th Amendment

Appellee in seizing the rights and properties and destroying the hunting, fishing and water rights of the appellant is violating due process of law, under the 14th amendment to the U. S. Constitution, as illustrated by

the following cases: In *Portland R.R. Co. v. City of Portland,* 181 Fed. 632, Appeal dismissed, 218 U.S. 686 (Bean, D.J., 1910 CC Ore.), the plaintiff, an Oregon corporation, sued to enjoin the City from taking its property. Held: The district court had jurisdiction. The court stated:

> "If the order of the common council under its authority to open streets has deprived, or is about to deprive, the complainant of its property without due process of law, it is entitled to a remedy in this court under Judiciary Act of March 3, 1887, c. 373, 24 Statutes 552, * * * and the Federal Constitution.
>
> " * * *
>
> "The fourteenth amendment is a guaranty to every citizen, private or corporate, that he shall not be deprived of property by a state, or any of its political subdivisions without due process of law, and the federal court has jurisdiction to enforce this guaranty."

In the case of *Iron Mountain, etc., v. City of Memphis* (CCA-6, 1899) at 96 Fed. 113, a Tennessee corporation sued to enjoin a threatened taking of its property by a municipal corporation of Tennessee. Held: Jurisdiction in the Federal courts in an able and exhaustive decision by Circuit Judge William H. Taft.

In *Coyahoga River Power Co. v. City of Akron,* 240 U.S. 462 (1916) an Ohio corporation sued to enjoin an Ohio Municipal corporation for the latter's efforts in building a dam on the waters of the river belonging to the plaintiff and without any intention or attempt to pay the plaintiff for them, as in the case at bar:

Mr. Justice Holmes, for the court, wrote his usual

succinct and brilliant decision, holding that the Federal court had jurisdiction.

Since the City of Tacoma is the extension of the State of Washington, in its exercise of eminent domain it may be identified as "the State" under the 14th amendment as set out in the prior cases cited, see also *Road Improvement District No. 2 v. Missouri Pacific Ry.*, 275 Fed. 600, where the analogy is practically identical to the facts and the law in the case at bar:

> "The power is conferred and the duty is imposed upon a Federal court sitting in equity to relieve by its decree, or other process, a citizen of the United States who properly invokes its aid from an arbitrary and unwarranted exercise of the legislative power of a state (or its subdvision), which, without due process of law or compensation threatens to deprive it of all or a part of its property."

Violation of Statutes

Another ground for jurisdiction of this Court is the violation by the City of Tacoma of 25 USCA 177, in that the City of Tacoma seeks an involuntary conveyance from the Indians by eminent domain, without compensation to the Indians. This statute was designed for the protection of the Indians under chapter 5, title 25 USCA, "Protection of Indians," and it is quoted in part:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or Tribe of Indians, shall be of any validity in law or equity, unless the same be made by Treaty or Convention entered into pursuant to the Constitution."

The City of Tacoma is doubly culpable under this statute because they are attempting to accomplish an illegal involuntary conveyance of Indian property rights without any compensation whatsoever. Both of these violations are threatened without a semblance of due process under the 14th Amendment. An Attorney General Opinion defines the operation of this section (18 Op. Atty. Gen. 235) as follows:

> "The operation of this section does not depend on the nature or extent of the title of the Tribe or Nation, and it applies whether the title is in fee simple or merely a right of occupancy."

In like manner the appellee is violating the following federal statutes (R. 103, 104):

> *Ordinance of 1787,* 1 Stat. 50, 51, as quoted *infra*:
>
> "The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent."
>
> *Oregon Territorial Act,* 9 Stat. 323 (August 14, 1849):
>
> " * * * nothing in this Act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by Treaty between the United States and such Indians . . . " (See opinion of Atty. General 22 June 1885)
>
> *State of Washington Enabling Act* (Disclaimer Clause, 25 Statutes c. 180 p. 676, Section 4 Ss2:
>
> "That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to . . . all lands lying within said limits owned or held by any Indian or Indian Tribes; and that until the title thereto shall have been ex-

> tinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian Lands *shall remain under the absolute jurisdiction and control of the Congress of the United States*: . . . " (Emphasis supplied)

Under the obvious construction of the foregoing federal acts the City of Tacoma, as a subdivision of the State of Washington is violating each of these acts according to their express terms and is depriving them of their property without due process of law.

ARGUMENT

It is apparent that the infant nation composed of the colonial states recognized and compensated the Indians for their aboriginal title. It is also very apparent that this nation rejected the "title by conquest" theory advocated and practiced by nations in the old world. This departure is further supported in legislation prior to the adoption of the Fifth Amendment in 1791 in the Ordinance of 1787, which language was incorporated in the Organic Act of 1848 creating the Territorial Government of Oregon (covering the lands in question):

> "The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent." (Statutes 50 and 51)

This admonition concerns the very land in question and defines the relation as trustee and ward between defendant and claimants.

Constitutional Precedent for Compensation for "Indian Title"

The Supreme Court of the United States in *Worcester v. Georgia,* 6 Peter 615, recognizes the fact that "Indian Title" could be extinguished by purchase as does the opinion of the Attorney General of the United States Wirt, in Op. A. G. 465.

The language of the Supreme Court in *U. S. v. Creek Nation,* 295 U.S. 108 at 110, is to the effect that the United States is the guardian of the Indians and this relationship:

> "did not enable the United States to give their tribal lands to others, or to appropriate them to its own purposes, without rendering or assuming an obligation to render just compensation for them."

This language is compelling and forceful and can be understood only in the light of the background set out above as referring directly to the phrase "just compensation" used in the Fifth Amendment.

The view that Indian Aboriginal Title is compensable is supported by numerous cases: *United States v. Santa Fe Pacific,* 314 U.S. 339 at 345, wherein *Mitchell v. United States* is quoted, 9 Peter 711, at 746; that Indian title is recognized is further supported in *Cherokee Nation v. Georgia,* 5 Peter 1 at 48; *United States v. Cook,* 92 U.S. 733 at 755; *Beecher v. Wetherby,* 95 U.S. 517 at 526.

The *Mitchell* case *supra* held that a conveyance of aboriginal lands by an Indian, was valid and that such right was later confirmed by Spain and in turn by the United States and that the United States did not acquire the property under the cession from Spain.

Upon reviewing the precedents of these cases and the language of the treaty negotiations of the United States with plaintiff, the conclusion is inescapable that Congress intended to compensate the Indians for their aboriginally held lands.

The fact that Congress has not done so, does not give the City of Tacoma, an inferior appendage of the State of Washington, the right to seize the tribal lands and property of the Cowlitz Indians. If the sovereign is bound to respect these rights, then there is no question but what the City of Tacoma has no license whatsoever to invade them.

Although, in the case at bar, Congress recognized plaintiff's title and entered into treaty negotiations at Cosmopolis with Governor Isaac Stevens in February 1855, the Treaty was never concluded (R. 92, 93, 94).

The plain meaning of the words "utmost good faith toward the Indian" used by Congress in the Act creating the Government of Oregon Territory in 1848, binds the United States to the duty of a Trustee toward the Indians and requires performance of the highest order in word and deed.

This language clearly sets the standard but the intervening treaty negotiations, the failure to conclude a treaty, the failure to honor the Indian rights, and the wanton disregard for tribal lands and rights by appellees, describes a course of conduct and dealing which are anything but fair and honorable.

Since the taking is by third parties and not by the United States, there is all the more reason to insist

upon "due process" and "just compensation" for the "taking of private property from Indian tribes."

Can "Indian Title" Be Conveyed or Transferred by Implication Without the Assent of the Indians, Although Congress Has Provided for Conveyance by Treaty?

Since there is in excess of 2,800,000 acres in the tribal lands claimed by plaintiff, it is doubtful that they could be transferred by some vague sequence of events as claimed by appellee.

The appellants have never transferred any of their tribal lands or property rights and have never assented to any transfer.

Indian title has been extinguished to a large part of the present State of Washington by various treaties covering lands adjoining those owned by appellants.

The court is requested to take judicial notice of the following treaties as the supreme law of the land, ceding Indian lands to the United States:

1. Treaty of Mukilteo (Pt. Elliott), January 22, 1854 (22 tribes), 12 Stat. 927;
2. Treaty of Point No Point, January 26, 1855 (15 tribes), 12 Stat. 933;
3. Treaty with the Makah, January 28, 1855 (5 tribes and bands), 12 Stat. 939;
4. Treaty of Medicine Creek, 12 Stat. 1132 (Sheh Nah-Nam Creek), December 26, 1854 (9 tribes);
5. Treaty with 14 tribes of Yakima, April, 1855, 12 Stat. 951:
6. Treaty with Nez Perce, June 11, 1855, 12 Stat. 957;
7. Treaty with Quinault, July 8, 1855, 12 Stat. 971.

The foregoing treaties are the means chosen by Congress for extinguishing "Indian title" and there is no treaty with plaintiff, and there is no act of Congress dealing with plaintiff's Indian title and no basis for their invasion of appellant's lands where appellee usurps the sovereignty of the United States of America.

Are these treaties the means of extinguishing "Indian title?" Or, should Congress have attached the phrase, "we really mean it," after the admonition of exclusive Congressional control in these acts?

Ordinance 1787, 1 Stat. 50 and 51 (Supra);

Oregon Organic Act 1848, 9 Stat. 323 (*Supra*);

Treaty Act 1850 and 1853, 10 Stat. 437 (*Supra*);

Washington Territorial Act 1889, 25 Stat. 674;

Washington State Const. Article XXVI (2).

It is heresy to constitutional precedent for appellee to don the cloak of the sovereign and appropriate the Cowlitz property rights while engaging in the proprietary business of merchandising electric power for profit.

Are Indians "People" and "Persons" Under the 5th, 10th and 14th Amendments?

Upon reading the solemn sentiments contained in these Acts of Congress which clearly spell out the special fiduciary (guardian and ward relation) between the United States and the Indians, the inescapable conclusion is that their title to their lands has never been extinguished, and that only Congress can expressly extinguish "Indian title."

That they are definitely "persons" and "people of the United States" under the 5th and 14th Amendments to the United States Constitution and that they have been denied due process of law under these amendments is obvious. Where Congress has spoken in such an emphatic, singular and precise manner, it is ridiculous for the appellee to maintain that a municipal corporation can assume the cloak of the sovereign and seize the lands and property rights of these Indians, without "just compensation."

Are Indians "Persons" Under the 14th Amendment?

One might properly ask the question, "Are Indians persons under the 14th Amendment?" If they are "persons," then should not the courts consider the admonition by Congress contained in the Ordinance of 1787 and the subsequent acts previously cited?

The following excerpts are quoted from the Oregon Territorial Act:

> "ACT ESTABLISHING TERRITORIAL GOVERNMENT OF OREGON
>
> August 14, 1848, 9 Stat. 323
>
> [Indian Rights of Person and Property Preserved]
>
> "PROVIDID that nothing in this Act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to

the government to make if this Act had never been passed: * * * "

[Dams May Not Obstruct Salmon in Streams]

"Sec. 12 *And be it further enacted,* that rivers and streams of water in said Territory of Oregon in which salmon are found, or in which they resort, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams."

[Ordinance of 1787 Extended to Oregon Territory]

"Sec. 14. That the inhabitants of said Territory shall be entitled to enjoy all and singular the rights, privileges and advantages granted and secured to the people of the Territory of the United States northwest of the River Ohio by the articles of the compact contained in Ordinance of seventeen July seventeen hundred and eighty-seven."

[Reservation of School Lands]

"Sec. 20 * * * Sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same is hereby, reserved for the purpose of being applied to schools in said Territories hereafter to be erected out of the same."

The Oregon Territory Organic Act of 1848, 9 Stat. 323, is the Statute which set the stage for Congress to acquire title to what is now the States of Oregon and Washington. There are four important provisions of that Act that define the rights of Indians in the New Territory obtained through the Treaty with Great Britain in 1846. The British did nothing to disturb the "Indian Title" of plaintiff, but insisted on paying the Indians for their lands as per the affidavit of Dr. Her-

bert Taylor herein (R. 39 to 68). These provisions are (as quoted above Section 1, Section 12, Section 14, and Section 20):

(1) The *first section* of the Act preserves all Indian rights "of person or property" and "so long as such rights shall remain unextinguished by Treaty between the United States and such Indians." This first section carefully protects these rights and is in derogation of Section 20 of the same Act which reserves Sections 16 and 36 for school purposes. Because the section one begins with this *Proviso* it is intended to qualify succeeding sections and therefore where sections 16 and 36 fall within Indian Lands to which the title has not been extinguished by Treaty, the schools did not get a title free of the Indian Title, but subject to the "Indian rights of property."

(2) Section 12 of the Act forbids construction of dams which will not "allow salmon to pass freely up and down such rivers and streams." While the defendant has attempted to make some provision for conserving the fishing it has presented nothing in the way of a plan or facility which will permit salmon to "pass freely up and down" or around or otherwise a 60 foot dam, let alone the 325 foot dam which is planned. It must be conceded that no spawning salmon going upstream or fingerlings going down river could ever survive this obstacle, nor the pressures created by such a head of water through the turbines.

(3) The Ordinance of 1787 has been discussed earlier in this writing on page 6, 7 and 11.

(4) Section 20 of the Act reserves section 16 and 36

which is subject to the "PROVIDED" clause in Section one, which in effect gives only the title the United States had at the time of the Act (1850) subject to the "Indian Title" which has never been extinguished.

Either a Treaty or express Federal legislation is required to extinguish Indian title and to annex territory.

Citing *Fleming v U. S.* (1850) 9 Howard 603; *Cross v. Harrison* (1853) 16 Howard 164, 197. 42 C.J.S. 1688 (Extinguishment of Indian title):

> "Possessory right of Indians to their Tribal Lands is sacred, something to be taken from the Indians only with their consent and on such conditions as may be agreed upon, and while, as has been indicated, this right may be extinguished by the general government or the state in which is the fee . . . . . only the government holding the fee can extinguish the right, and until the right is extinguished by some definite action it cannot be questioned.
>
> "the right is extinguished only by plain and unambiguous actions."

United States v. Santa Fe R. R., 314 U.S. 339 (This case will be discussed at length later.)

The Treaty method of annexing Indian title was chosen by Congress because as stated in the case of *Cherokee Nation v. Georgia* (1831) 5 Peters 1, Indians were described by Chief Justice Marshall,

> "They may more correctly, perhaps, be denominated Domestic dependent nations * * * they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."

Chief Justice Marshall in the same case stated:

> "The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the consent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States."

The peculiar status of Indians is further described in the *United States v. Kagama* (1886) 118 U.S. 375 as follows:

> "These Indian tribes are wards of the nation. They are communities dependent on the United States . . . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and treaties in which it has been promised, there arises the duty of protection, and with it the power . . . . The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all its tribes."

In accord with the Congressional mandate to extinguish Indian Titles to their lands by Treaty, Congress enacted the Treaty Act of 1850, 9 Stat. 437, fol-

lowed by a Supplemental Act of 1853. Portions of the Act of June 5, 1850 are quoted as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be authorized to appoint one of more commissioners to negotiate treaties with the several Indian Tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade Mountains; and, if found expedient and practicable, for their removal east of said mountains; . . . "
>
> "Section 5, *And be it further enacted,* That the law regulating trade and intercourse with the Indian Tribes east of the Rocky Mountains or such provisions as may be applicable be extended over the Indian Tribes in the Territory of Oregon." (7F896)

(1) It is significant that the first section calls for negotiating "Treaties with the Indians of Territory of Oregon, for the *extinguishment of their claims to lands* lying West of the Cascade mountains . . . . ." If Congress had intended to disregard Indian rights of property, *why* did that august body devote dozens of statutes, treaties and millions of dollars to that end?

(2) Section 5 further preserves Indian Rights and extends Treaty Protocol of Eastern Tribes to the West:

Although the appellee claims that the Cowlitz Tribe of Indians' rights have "long been extinguished," no acts of Congress are cited which extinguish these rights and no cases have been cited supporting this contention.

Does Aboriginal (Indian Title) Title Create a Vested Right Legally Enforceable Against Everyone Except the Sovereign?

While the foregoing authorities and points are compelling, the cases are legion in supporting the fact that third parties (and by that term the defendant is included) cannot interfere with the aboriginal title of plaintiffs. In fact, the principal case relied upon by defendant, *Teehiton v United States,* 99 S. C. Advance Dec., 254-255, holds that such a title when shown to exist is good against the whole world but not as against the United States. 348 U. S. *Teehiton v. U. S. A.*

> "This . . . amounts to a right of occupancy which the Sovereign . . . protects against intrusion by third parties . . . "

The *Duwamish* case, 79 C. Cl. 530, is cited by defendant in support of its position when in fact that case holds that as against the United States, only Congress can decide the issues as to whether the sovereign can be forced by the courts to compensate Indians for aboriginal title. It is distinguished in any event, since it involves 22 Indian Tribes suing as parties to the TREATY OF POINT ELLIOTT OF 1855, *supra.,* and the COWLITZ have no treaty, and were not parties to that law suit and plaintiff cannot depend upon *res adjudicata.*

The Supreme Court of the United States has spoken on this problem and it has been resolved in favor of the Indians; the pertinent portions of the decision which came from the 9th Circuit in *United States v. Santa Fe R. R. Co.,* 314 U.S. 339, are quoted:

> (1)" This Court has consistently held that, in the absence of express language to the contrary, a fed-

eral grant of public lands does not constitute an extinguishment of Indian occupancy rights. Citing *Johnson v. McIntosh,* 8 Wheat. 543 at page 574."

And from the same decision; defining "Indian Title":

(2) "The term 'Indian title' used in Section 2 of the Act of 1866 had a well understood meaning. It connoted the Indian possessory right based on aboriginal occupancy, whether or not that occupancy had been recognized by treaty, statute, or otherwise. *Johnson v. McIntosh,* supra. at page 543 and *United States v. Shoshone,* 304 U. S. 111."

With this definition in mind, and the following language from the *Santa Fe* case, the extensive authorities quoted by appellee on jurisdiction, the merits, and the naked assertion that "all . . . appellant's rights . . . have long been extinguished by various acts of Congress (R. 17, 18)," we are curious to know how appellee can reconcile this case and the quoted statutes (at page 342):

(3) "This Court has continuously recognized that aboriginal possession creates a possessory right legally enforceable against everyone except the United States. Citing *Worcester v. Georgia,* 6, Pet. 515, *Mitchell v. United States,* 9 Pet. 711; *Choteau v. Molony,* 16 How. 203, *Holden v. Joy,* 17 Wall. 211, 244; *Buttz v. Northern Pacific R. R.* 119 U.S. 55, *Cramer v. United States,* 261 U.S. 219, and a host of other cases."

At page 345, the above quoted *Santa Fe* case said:

(4) "Occupancy is a question of fact to be determined as any other question of fact. (see also *Alcea v. United States,* 103 C/Cl 550)"

And further from the same page:

(5) "As stated in *Mitchell v. U. S.,* supra, at

page 746, 'Indian right of occupancy is considered as sacred as the fee simple of the whites.' . . . "

And at page 354, we quote:

(6) "But an extinguishment cannot be implied in view of the avowed solicitude of the Federal Government for the welfare of its wards. As stated in *Choate v. Trapp,* 224 P.S. 665, 675, the rule of construction recognized without exception for over a century has been that 'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the Nation, and dependent wholly upon its protection and good faith."

At page 355, we find an excerpt which is amazing in its application to the case at bar:

(7) "Their forcible removal in 1847 was not pursuant to any mandate from Congress. It was a high handed endeavor to wrest from the Indians lands which Congress had never declared forfeited."

A portion of the property to be condemned by the City of Tacoma are ten tracts which originally were granted to the Northern Pacific R. R. Six of these tracts were conveyed by the United States by patent to the railway company pursuant to the authority created by the Act of July 2, 1864, 13 Stat. 365, Chapt. 217. It is the position of the Indians that there is no way to distinguish between these railroad patents and those in the case of the *United States v. Santa Fe,* supra. The latter case is commonly known as the *Walapai* case, because the United States sued as guardian on behalf of the Hualpai or Walapai Indians. The Santa Fe Rail-

road acquired alternate sections of land along its line by authority of 14 Stat. 292. The words of the conveyance by the United States in 14 Stat. 292 are identical to those in 13 Stat. 365 (R. 17, 18), and are in part as follows:

> "Sec. 3 . . . . that there be, and hereby is granted to the 'Northern Pacific Railroad Company' its successors and assigns, (here the Santa Fe) . . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States . . . and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated and free from preemption, or otherwise appropriated and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office. . . "

A comparison between Section 2 of the two statutes (and those quoted by appellee) reveals that there is almost identical language, as follows:

> "Sec. 2 . . . The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the said Indians and/*only by their voluntary session* the Indian titles to all lands falling under the operation of this Act, and acquired in the donation of the /road/ named in this bill . . . "

The portion in italics in the foregoing quotation is in the Walapai statute and is not in 13 Stat. 365, the statute covering the lands in the case at bar. But, of

course, the phrase " . . . and only by their voluntary session . . ." alludes to the relationship between the United States and the Indians and does not, nor cannot, enlarge or diminish the rights of the Railroad, or as, in the case at bar, the appellee. The important part of the two statutes is the grant of alternate sections by the United States, "whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated and free from preemption or other claims or rights . . ."

The interesting thing about this situation is that in the WALAPAI or Santa Fe case (314 U.S. 339), the Supreme Court held that aboriginal rights of the Indians survived the patents to the railroad, and that the railroad had to give an accounting of the use of such alternate sections from the time it acquired the property, which we assume would be shortly after 1865, up until at least 1941 when the case was decided.

Some of the first six lots referred to herein may have been granted under authority of the Act of May 31, 1870, 16 Stat. 378, but as before, the United States excepted ". . . mineral and other lands as excepted in the Charter of said Company of 1864."

Two of the tracts identified by defendant apparently were conveyed pursuant to the Act of July 1, 1898, 30 Stat. 597, Chapt. 546. This was an appropriation act which had a "rider" attached to it at page 620, of 30 Stat. 620, and as before, the property conveyed to the railroad had to be "free from any valid adverse claim" * * * as though it had been originally granted."

And further, relating to tracts identified by appel-

lee, two of the tracts were apparently conveyed to the railroad pursuant to the authority of the Act of May 17, 1906, 34 Stat. 197, Chapt. 2470, which merely extended the Act to July 1, 1898, 30 Stat. 597, 620, to a little later date.

The basic plan of the Acts of July 1, 1898, 30 Stat. 597, 620, and the Act of May 17, 1906, 34 Stat. 197, was that the railroad did not get all it bargained for because certain homesteaders and other persons securing rights under the Oregon Donations Act of 1850, had settled on such alternate sections. Therefore, in order to avoid a quarrel between the Railroad and such settlers, the United States granted the Railroad the right to select other sections of land in lieu of those claimed by the homesteaders and others under the Oregon Donations Act of 1850. So it is apparent that the basic rights that the Railroad had to the four tracts identified by defendant were acquired pursuant to 30 Stat. 597, and 34 Stat. 197, were merely replacements (in lieu of selections) of the basic grant in 13 Stat. 365, and logically would be burdened with any restrictions which were carefully set out in the basic statute.

Because all of the railroad grants are burdened with this encumbrance, referring to the tracts identified by defendant, which we assume are correct for the purposes of this brief, they are all subject to the claims and Indian titles of the Cowlitz Tribe of Indians. Thus, in conclusion of the matter of the Railroad grants, the statute says they are subject to the Indian rights and titles, and the railroad took title "at the time the line of said road is definitely fixed," then by analogy, it is a

question of fact as to the period for which the Railroads as well as others in possession of plaintiffs' lands, must account to plaintiffs for their use and occupation.

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